82-821

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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

In Re the matter of
Disciplinary Proceeding
Against Hugh W. Stroh
An Attorney at Law

Petition for a Writ of Certiorari to the Washington State Supreme Court

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Gerald B. Netzky
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7969 Gilman St.
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August 5, 1982

QUESTION PRESENTED

1. Whether the highest Court of the State can unilaterally go beyond the scope of issues certified to it for resolution and decide the same without due process hearing and without notification to all parties interested in the matter that additional issues will be resolved when deprivation of the right to practice a profession (a property right) is at issue.

2. When the highest Court of the State adopts precise rules of discpline for all attorneys, can the Court deviate from the exactness of the rules under the auspicies of its inherent authority and treat the individual attorney differently without offending federal safeguards of equal protection?

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

In Re the matter of Disciplinary
Proceeding Against HUGH W. STROH,
An Attorney at Law

Petition for a Writ of Certiorari to the Washington State Supreme Court

The Petitioner Hugh W. Stroh respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on May 19, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington has been reported and appears in the appendix hereto as well as the Order Denying Motion to Reconsider.

JURISDICTION

The judgment and order of the Supreme Court was entered on the 19th day of May, 1982. A timely petition for rehearing *en banc* was denied on the 9th day of July, 1982, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1)(2).

STATEMENT OF THE CASE

On September 28, 1970, Hugh W. Stroh was admitted to practice law in the State of Washington. On or about March 22, 1977, Stroh was involved in an incident which resulted in a formal charge being filed against him for tampering with a witness pursuant to Revised Code of Washington section 9A-72-120(a). The charges were subsequently dismissed on Stroh's motion on the grounds that the law was unconstitutional due to vagueness.

The prosecuting attorney for King County, State of Washington filed an appeal directly to the Supreme Court of the State of Washington, the result of which resulted in a remand. Approximately two years later on April 30, 1979 a jury returned a verdict of guilty and disciplinary action ensued.

The hearing examiner for the Washington State Bar Association made several positive findings in regard to the discipline of Stroh, but concluded that disbarment was in order. The disciplinary order was appealed to the disciplinary panel of the Washington State Bar Association which reversed the conclusion of disbarment and dismissed the complaint pursuant to disciplinary rule [DR 2-103(a)(3) and DRA 1.1(a)].

Neither notice of the dismissal of the complaint nor a copy of the Board's conclusions was forwarded to the Washington State Supreme Court pursuant to DRA 5.6(d), which is set out as follows,

> "If the formal complaint is dismissed . . . the record of the proceeding shall be retained at the office of the Association."

and pursuant to DRA 3.1(b)5:

> "No technical irregularities shall affect the validity of such complaint or of any proceedings pursuant thereto."

Based on the assumption and belief that the disciplinary matter had been concluded, Stroh withdrew his criminal appeal on November 14, 1980. No further events transpired until approximately one year later when, on January 13, 1981, the prosecuting attorney discovered that the disciplinary board had dismissed the complaint against Stroh. The prosecuting attorney requested that the disciplinary board reconsider the Stroh matter and after oral argument the Board denied a motion for reconsideration whereupon the prosecuting attorney certified to the Washington State Supreme Court the following issues:

> "(a) Should the Court take cognizance of this matter either upon the petition of the prosecuting attorney of King County or upon its own motion?

(b) Do the proceedings before the disciplinary board in its order of February 22, 1980 comply with the disciplinary rules for attorneys (1) as a matter of law; and (2) as a matter of fact."

Neither issue requested the Supreme Court to undertake disciplinary action against Stroh.

On May 13, 1982, the Supreme Court promulgated an opinion which not only addressed the issues as above stated, but went beyond the scope and unilaterally disbarred Stroh. In addition, Stroh was forced, without notice, to respond at oral argument before the Washington State Supreme Court to address the issue as to what discipline was appropriate. Neither the prosecuting attorney, the attorney for the Washington State Bar Association, nor Stroh had any notice that disciplinary matters were to be considered at oral argument.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SUPREME COURT TO GO BEYOND THE SCOPE OF THE ISSUES CERTIFIED TO IT ABUSED FUNDAMENTAL DUE PROCESS.

The Fourteenth Amendment of the United States Constitution states in part the following:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

The right to practice law is properly within the constitutional definition and deprivation thereof invokes due process. *In. Re Ruffalo*, 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222 (1968). The disbarment of Stroh under the auspices of "justice to both him and the public" offends Stroh's constitutional rights and justifies the granting of certiorari to review the order and decision of the Washington State Supreme Court. *In Re Oliver*, 333 U.S. 257; *Selling v. Radford*, 243 U.S. 46, 51.

2. UNIQUE TREATMENT OF MR. STROH OFFENDS THE "EQUAL PROTECTION RIGHTS" WHEN TESTED AGAINST THE DISCIPLINARY RULES FOR ATTORNEYS AS PROMULGATED BY THE WASHINGTON STATE SUPREME COURT.

The Supreme Court of the State of Washington adopted the disciplinary rules for attorneys on Feburary 3, 1975. As part and parcel of those rules, DRA 5.56(d) is set out as follows:

"DISPOSITION NOT REQUIRING SUPREME COURT ACTION. *If the formal complaint is dismissed* or if there is no recommendation of discipline by the Board or if the recommendation is that the respondent attorney be censured or reprimanded or the further proceedings be suspended and the censure or reprimand or suspension of proceedings is accepted by the respondent attorney, *the record of the proceedings shall be retained in the office of the Association.*"

(Emphasis added).

It goes without contest that on January 18, 1980, the disciplinary board of the Washington State Bar Association dismissed the complaint against Stroh.

"RESOLVED that the Board, having given due consideration to the record, finds that the respondent's acts and conduct in this matter did not involve moral turpitude within the meaning of DR 2-103(A)(3) and DRA 1.1(a).

"Accordingly, we hereby strike the conclusions and recommendation of the hearing officer and direct that the complaint be dismissed."

In light of the preciseness of the above rule, the Washington State Supreme Court issued a show cause order requiring Stroh to appear before it. The Supreme Court admitted that the above rule is ambiguous in nature and in light of the usage of the word "dismissal"

"To put (action or party) out of consideration; to refuse to hear further."

Webster's New Collegiate Dictionary, 3rd Edition, 4. 4. Law the Supreme Court unilaterally reinterpreted it, so that Stroh could not rely on the Bar Association's dismissal. The Court reached the aforementioned position by casting aside its own rules and concluding that they were overriden by the general structure of disciplinary action.

To treat an individual uniquely under the rules is offensive to equal protection. There is no need to cite authority for support of this position as the dogma is well established.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court, for the court;

(1) Exceeded its authority by considering matters that were not properly before it.

(2) Proffered constitutional error by relying on an incomplete record addressing mitigating circumstances by not taking into consideration matters of mitigation occuring between the date the record was established and the hearing date.

(3) Treated Stroh differently than what their own rules prescribe.

Dated: August 5, 1982

Respectfully submitted,

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Appendix

[No. C.D. 6869. En Banc. May 13, 1982.]

In the Matter of the Disciplinary Proceeding Against HUGH W. STROH, *an Attorney at Law.*

NORM MALENG, *Prosecuting Attorney, Petitioner,* WASHINGTON STATE BAR ASSOCIATION, *Respondent.*

[1] **Attorney and Client — Discipline — Nonaction by Disciplinary Board — Review.** The Supreme Court has the inherent authority to review in full all matters where the Disciplinary Board has not properly applied the Disciplinary Rules for Attorneys.

[2] **Witnesses — Tampering — Moral Turpitude.** The crime of tampering with a witness (RCW 9A.72.120) necessarily involves moral turpitude.

[3] **Attorney and Client — Discipline — Felony Conviction — Dismissal — Notification of Supreme Court.** The Disciplinary Board must notify the Supreme Court of any dismissal of a complaint involving an attorney's felony conviction.

[4] **Attorney and Client — Discipline — Complainant — Notifying Bar of Attorney's Conviction.** A person who notifies the bar association of an attorney's conviction and requests that disciplinary proceedings be instituted is a complainant for purposes of the Disciplinary Rules for Attorneys.

[5] **Attorney and Client — Discipline — Power of Supreme Court — Due Process.** The Supreme Court has full authority to impose sanctions on an attorney for misconduct. Due process requirements are satisfied if the attorney is given an opportunity to argue the facts and the proper discipline at a hearing conducted by the bar association.

[6] **Attorney and Client — Discipline — Degree of Punishment — Factors.** When determining the appropriate sanction to be imposed upon an attorney for professional misconduct, the Supreme Court considers the seriousness and circumstances of the offense and whether the sanction is sufficient to prevent recurrence, to deter others from such misconduct, to maintain respect for the legal profession, and to assure the public that it will be protected from unprofessional conduct.

WILLIAMS, J., concurs in the result only; UTTER and DOLLIVER, JJ., dissent by separate opinion; DIMMICK and PEARSON, JJ., did not participate in the disposition of this case.

Nature of Action: The Disciplinary Board dismissed a complaint against an attorney who had been convicted of tampering with a witness but did not notify the Supreme Court or the complainant of its action.

Supreme Court: Holding that the crime involved moral turpitude, that the Supreme Court and the complainant were entitled to notice of the dismissal, that justice required final resolution of the case, and that the attorney's actions warranted disbarment, the court enters a *judgment of disbarment*.

David Boerner, Chief Criminal Deputy, Robert S. Lasnik, Deputy, and *Norm Maleng, King County Prosecuting Attorney,* pro se, for petitioner.

Kurt M. Bulmer, for respondent Bar Association.

James J. Lamont, Gerald B. Netzky, and *Hugh W. Stroh,* pro se, for respondent Stroh.

BRACHTENBACH, C.J.—We have been asked to review the actions of the Disciplinary Board in dismissing a complaint against an attorney who has been convicted of a felony. For the reasons set out below, we conclude that the Disciplinary

Board erred. Pursuant to our inherent authority to supervise the practice of law, we have reviewed the record and conclude that attorney Hugh Stroh's actions warrant disbarment. We so order.

These facts are undisputed:

On April 30, 1979, attorney Hugh W. Stroh was convicted of tampering with a witness in violation of RCW 9A.72-.120(1)(a). Tampering with a witness is a class C felony. He was sentenced to 30 days in jail and placed on probation for 3 years. In addition, he was required to pay court costs and a $500 fine, and perform 150 hours of community service. The provisions of the sentence have since been carried out. A notice of appeal by Stroh from the conviction of the crime charged was filed but then withdrawn on November 14, 1980.

The King County Prosecutor, Norm Maleng, filed a formal complaint with the Washington State Bar Association. That organization, aware of the charges against attorney Stroh, had instituted disciplinary proceedings under Discipline Rules for Attorneys DRA 9.1(a) and DRA 1.1(a).

DRA 9.1(a) provides that an attorney who has been convicted of a felony will be automatically suspended until the Board determines the appropriate final disposition of the case.

DRA 9.1(a) states:

> An attorney shall be automatically suspended from the practice of law upon his conviction of a felony under either state or federal law, whether such conviction be after a plea of guilty, nolo contendere, not guilty, or otherwise, and regardless of the pendency of an appeal, and upon the filing of a certified copy of such conviction with the Supreme Court. Provided, however, that the Board may recommend to the Supreme Court for final disposition the prevention or termination of the suspension if such Board affirmatively finds that moral turpitude was not in fact an element of the crime of which the attorney was convicted, or if the Board affirmatively finds that there is other good cause for preventing or terminating such suspension. Suspension in this manner shall not be a substitute or alternative for disciplinary

> proceedings against said attorney, but such proceedings shall be commenced by the Board upon said conviction, or prior thereto if reasonable cause therefor exists, and shall proceed without regard to said suspension.

Prior to sentencing, Mr. Stroh petitioned the Disciplinary Board pursuant to the provisions of DRA 9.1(a). The Disciplinary Board granted that motion and forwarded a certified copy of the conviction, along with its recommendation, to this court. The recommendation in part stated:

> [T]he Board being fully advised in the premises and finding that there is a question whether moral turpitude is in fact an element of the offense for which Mr. Stroh was convicted and that there is a good cause for preventing Mr. Stroh's suspension and finding that a hearing should be held to determine whether moral turpitude is an element of Mr. Stroh's offense, hereby unanimously
>
> RECOMMENDS that attorney Hugh W. Stroh not be automatically suspended from the practice of law upon the filing of a certified copy of his conviction with the Supreme Court.

Acting on the assumption that a hearing would be held, we did not respond to the recommendation and Mr. Stroh was not suspended.

While DRA 9.1(a) imposes discipline for the period between an attorney's conviction of a felony and the final disposition of his case, DRA 1.1(a) governs the course of all subsequent disciplinary proceedings. That section requires that a fact-finding hearing be held to investigate the charges.

In felony cases, a hearing panel officer must determine whether moral turpitude was in fact an element of the crime committed and recommend appropriate disciplinary action. An investigative hearing was held and the hearing panel officer filed his findings of fact, conclusions of law, and recommendation concerning Hugh W. Stroh. The hearing panel officer concluded that "Respondent's [Stroh's] conduct in attempting to get a witness to testify falsely violated the commonly accepted standard of good morals, honesty and justice, and involved moral turpitude."

The hearing panel officer then concluded Stroh had violated DRA 1.1(a) in that he had been convicted of a felony involving moral turpitude. Even though the hearing panel officer concluded the risk of recidivism was remote, he felt compelled to recommend, subject to DRA 8.1(a), that Stroh be disbarred because his crime involved moral turpitude.

The findings, conclusions and recommendation of the hearing panel officer were considered by the Disciplinary Board at its January 18, 1980, meeting. The chairman of the Disciplinary Board issued the following order:

> RESOLVED that the Board, having given due consideration to the record, finds that the respondent's acts and conduct in this matter did not involve moral turpitude within the meaning of DR 2-103(A)(3) and DRA 1.1(a).
>
> Accordingly, we hereby strike the conclusions and recommendation of the Hearing Officer and direct that the complaint be dismissed.

Neither notice of the dismissal of the complaint nor a copy of the Board's conclusions was forwarded to this court. Also, the prosecutor was not notified of the dismissal as required by DRA 5.6(m).

On January 13, 1981, when Mr. Stroh requested suspension of his jail sentence, the prosecuting attorney discovered that the Disciplinary Board had dismissed his complaint against Stroh. The prosecuting attorney requested that the Board reconsider the case. After oral presentation by the prosecutor and Mr. Stroh on March 20, 1981, the Board denied the motion to reopen.

The prosecuting attorney seeks review of that denial. He claims that the Disciplinary Board failed to follow the Discipline Rules for Attorneys. He also urges that the Board erred in failing to transmit to this court the record of its dismissal of the complaint against Stroh. The Board erred, argues the prosecutor, because only this court has the authority to dispose of a case in which a member of the bar has been convicted of a felony. Finally he claims the Disciplinary Board committed error of law in violation of its duty under DRA 1.1(a) by striking the conclusions and rec-

ommendation of the hearing panel officer and by dismissing the complaint.

On July 10, 1981, this court issued a show cause order directed to the bar association and Mr. Stroh. Our order contained the following statement:

> That the parties shall file briefs and present oral argument according to a schedule set by the Clerk of the Supreme Court concerning the following issues, and other issues deemed relevant by the parties:
>
> (a) Should the Court take cognizance of this matter either upon the Petition of the Prosecuting Attorney of King County or upon its own motion?
>
> (b) Did the proceedings before the Disciplinary Board and its Order of February 22, 1980, comply with the Discipline Rules for Attorneys (1) as a matter of law and/or (2) as a matter of fact?

At oral argument, attorney Stroh was also allowed to argue the general question of what action this court should take regarding discipline. We therefore decide not only the specific questions stated above, but also the ultimate disposition of the case.

I

[1] It is not disputed that this court has the inherent power to promulgate rules of discipline, to interpret them, and to enforce them. *Dodd v. Bannister*, 86 Wn.2d 176, 187, 543 P.2d 237 (1975). When the Disciplinary Board fails to carry out is duties regarding discipline, we will protect the process by exercising our inherent power to review the entire matter. *Moore v. Smith*, 89 Wn.2d 932, 939, 578 P.2d 26 (1978). Because of the serious nature of the crime of which Hugh Stroh has been convicted, the effect the dismissal of the complaint has upon public respect for the legal profession, and the allegation that the Disciplinary Board violated the Discipline Rules for Attorneys by dismissing a complaint involving moral turpitude, this case requires our scrutiny.

Appendix

A

Having decided to review the Board's action, we must address the second prong of our order to show cause: Did the proceedings before the Disciplinary Board and its order of February 22, 1980, comply with the Discipline Rules for Attorneys?

We conclude that the Board's interpretation of the Discipline Rules for Attorneys was incorrect. The following discussion should clarify the responsibilities of the Board in future proceedings.

The Disciplinary Board erred initially by striking the findings of the hearing officer and substituting its own conclusion that moral turpitude was not an element of the crime committed by Stroh. This conclusion cannot be reconciled with either the precedents of this court or the facts of this case.

[2] First, the crime of tampering with a witness strikes at the very core of the judicial system and therefore necessarily involves moral turpitude. "This system assumes that litigants, lawyers, and witnesses have but one common goal—the ascertainment of truth." *In re Bucci*, 376 A.2d 723, 727 (R.I. 1977) (Kelleher, J., dissenting to 2-year suspension). An attorney presents his case almost entirely through the testimony of witnesses. Although an occasional witness may perjure him/herself, the presentation of the opponent's other witnesses and effective cross-examination frequently reveals the falsehood before a fraud has been perpetrated upon the court. A witness, tampered with by an attorney, however, becomes much more destructive to the search for truth. That witness, privy to the testimony of other witnesses, can avoid the pitfalls of contradiction and refutation by judicious fabrication.

Vigorous cross-examination may become ineffective as the coached witness would know both the questions and the proper answers. In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, "For an attorney at law to actively procure or knowingly countenance the commission

of perjury is utterly reprehensible." *In re Allen*, 52 Cal. 2d 762, 768, 344 P.2d 609 (1959).

Furthermore, this court has consistently held that subornation of perjury, the previous statutory equivalent of Stroh's crime, involves moral turpitude. *In re Kerr*, 86 Wn.2d 655, 548 P.2d 297 (1976); *In re Caffrey*, 71 Wn.2d 554, 429 P.2d 880 (1967); *In re Bixby*, 31 Wn.2d 620, 198 P.2d 672 (1948).

Finally, Mr. Stroh requested and the jury was instructed that the crime of which Stroh was charged required proof of criminal intent. Thus, by adjudging Hugh Stroh guilty, the jury specifically found that he had acted with the objective of committing a crime, in this case tampering with a witness.

As we observed when Mr. Stroh's criminal charge was before us,

> attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose and it is their natural tendency to obstruct justice. They are offenses against the very object and purpose for which courts are established.

State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979). In sum, no other conclusion except that moral turpitude was involved can be reached in this case. Consequently, the Disciplinary Board erred in dismissing the complaint against Stroh.

It appears, however, that the Disciplinary Board may have been influenced by Stroh's argument that the jury system simply did not work for him. He argued before this court that

> if you put an attorney in front of a jury you're running a substantial risk; and I told my attorney at that time, I don't think we have a jury, I think we have a firing squad. And that's precisely what we had.

Although these views may be commonly held, they cannot be the basis of a disciplinary decision. To foster respect for our legal system we must assume that the jury acted

properly and treated Stroh as it would any other individual. We cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves.

B

The Disciplinary Board also erred in failing to bring its dismissal of the complaint against Stroh to this court's attention. This issue is one created by ambiguity in the Discipline Rules for Attorneys. Unlike DRA 9.1(a), which specifically places with this court the ultimate determination that an attorney convicted of a felony may continue to practice law, DRA 1.1(a), the provision governing Stroh's hearing, contains no reference to this court. Furthermore, the provisions referring to dismissal of complaints do not explicitly require that the Board notify the Supreme Court. DRA 5.6(d) states only that:

> If the formal complaint is dismissed or if there is no recommendation of discipline by the Board or if the recommendation is that the respondent attorney be censured or reprimanded or that further proceedings be suspended, and the censure or reprimand or suspension of proceedings is accepted by the respondent attorney, the record of the proceeding shall be retained in the office of the Association.

[3] The bar association interpreted DRA 5.6(d) to allow the dismissal of *any* complaint, even one involving an attorney convicted of a felony. Such an interpretation, though plausible, conflicts with a variety of provisions in the discipline rules that emphasize the Supreme Court's control over serious disciplinary proceedings. For instance, the Supreme Court must approve even a stipulated suspension or disbarment, DRA 3.3; it must be notified if the Board stays a disciplinary action involving suspension, DRA 5.6(i); and it must approve any petition to reinstate a disbarred attorney, DRA 8.6(b).

Consequently, since the Board's action was inconsistent with the general structure of the Discipline Rules for Attorneys which place ultimate authority for serious offen-

ses with this court, we hold that it was error to dismiss this complaint without notifying the court. This conclusion is bolstered by the fact that every attorney who has been convicted of a felony in this state has been disbarred. *See, e.g., In re Krogh*, 85 Wn.2d 462, 536 P.2d 578 (1975). The Disciplinary Board and bar association should have sought review before departing from our precedents.

C

[4] Finally, the Disciplinary Board erred in failing to notify the prosecutor of the dismissal of his complaint. DRA 5.6 requires that the Board notify the complainant of "the final disposition of the complaint." DRA 5.6(m). A reasonable interpretation of DRA 2.7 leads to the conclusion that by notifying the bar association of Mr. Stroh's offense and requesting disciplinary proceedings, the prosecutor became the complainant. The record does not reveal any justification for the Board's failure to notify the prosecutor of the dismissal. Because the other errors discussed above justify our review, we mention this failure merely to emphasize its importance in the disciplinary scheme.

In conclusion, we find that the proceedings before the Disciplinary Board did not comply with the disciplinary rules. The Disciplinary Board erred in law and fact by (1) striking the finding of moral turpitude; (2) dismissing a complaint involving a felony without notifying this court; and (3) failing to notify the complainant of that dismissal.

II

[5] These conclusions, however, do not put an end to our inquiry. Although our show cause order did not specifically address the issue of what disciplinary action should be taken against Stroh, justice to both him and the public demands that we resolve all issues involved in his case. Almost 5 years have passed since the incident which gave rise to Stroh's criminal conviction. He has been subjected to publicity and recently, uncertainty as to the final disposition of his case. Fairness to him requires that we decide this issue as expeditiously as possible. Since oral argument,

Mr. Stroh has supplied us with the transcript of his trial. That and the record before the hearing panel officer are sufficient to determine the appropriate discipline. Since the original fact-finding hearing allowed Stroh to argue the proper discipline, no due process values are implicated by our decision to resolve this issue. Furthermore, public confidence in the system has been severely eroded by the lapse of time involved in this case. Public respect for the legal profession demands the final resolution of this case.

Turning to the issue of appropriate discipline, we must conclude that disbarment is warranted.

Although a per se disbarment rule in attorney discipline cases does not, on balance, serve the ends of justice, the facts of this case do not warrant departure from our previous law.

[6] The issue of what is the appropriate discipline in this case raises the greater question—what does the court seek to accomplish by such discipline? We have noted the factors to be considered in *In re Smith*, 83 Wn.2d 659, 663, 521 P.2d 212 (1974):

> In making the ultimate determination as to the measure of disciplinary action, we give consideration to: (a) the seriousness and circumstances of the offense, (b) avoidance of repetition, (c) deterrent effect upon others, (d) maintenance of respect for the honor and dignity of the legal profession, and (e) assurance that those who seek legal services will be insulated from unprofessional conduct.

We discussed above the extremely serious nature of this crime and need not elaborate on that point here. Suffice it to say that even if tampering with a witness were not a felony, the detrimental effect such a crime has upon the judicial system demands close scrutiny.

Although the hearing panel officer made a specific finding that the chance of recidivism in this case was small, we see no evidence except Mr. Stroh's withdrawal from criminal practice to support the argument that he will not repeat this crime. Indeed, his arguments on his own behalf per-

suade one that the same ethical shortcomings that led to his conviction in 1979 may lead to a similar incident.

Mr. Stroh, despite his conviction, refuses to admit that he did anything wrong. During oral argument he referred to his actions as "a simple plea bargaining act." Even if we were to accept Mr. Stroh's representations regarding his good intentions in this matter, it is obvious that Mr. Stroh still cannot distinguish between proper and improper methods of achieving his goals. His continual denial of the fact that his actions were improper is strong evidence of Mr. Stroh's inability to distinguish right from wrong. This ethical shortcoming cannot be tolerated in an attorney. Consequently, *Smith*'s second factor also weighs against Mr. Stroh.

Similarly, factor (c), the deterrent effect upon others, argues in favor of severe discipline in this case. The action we take today serves as notice to members of the legal profession that there is a difference between protecting a client's interests by negotiating a lesser penalty and attempting to escape criminal liability by requesting a police officer to modify his/her testimony. Under no circumstances may *false* testimony be introduced into a hearing by an officer of the court.

Finally, factors (d) and (e), those aspects of lawyer discipline that are designed to protect the public and preserve the public's confidence in the legal profession, argue most strongly for disbarment in this case. Allowing an attorney who has been convicted of this crime to go undisciplined inevitably erodes the public's confidence in the legal profession and the judicial system.

Lawyers provide the public's chief contact with the law and the judicial system. Because of this position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. (CPR) EC 1–5. By attempting to tamper with a witness, Mr. Stroh demonstrated not only his disregard for a specific law but also his contempt for the judicial process. We cannot sanction that contempt.

Although it is unfortunate that this matter must be resolved only at this late date, we cannot allow Mr. Stroh's conduct to go undisciplined.

Attempting to tamper with a witness represents a flagrant disregard for the very principles upon which our legal system is grounded and renders an attorney unfit to practice law. We therefore order that the name of Hugh W. Stroh be stricken from the roll of attorneys in this state.

ROSELLINI, STAFFORD, and DORE, JJ., and COCHRAN, J. Pro Tem., concur.

WILLIAMS, J., concurs in the result.

UTTER, J. (dissenting)—I dissent. The order of July 10, 1981, of this court defining the issues to be determined on hearing before us carefully stated what was to be decided. Our show cause order was limited to

> (a) Should the Court take cognizance of this matter either upon the Petition of the Prosecuting Attorney of King County or upon its own motion?
>
> (b) Did the proceedings before the Disciplinary Board and its Order of February 22, 1980, comply with the Discipline Rules for Attorneys (1) as a matter of law and/or (2) as a matter of fact?

The written briefs filed before this court by the bar association, King County Prosecuting Attorney, and Mr. Stroh make apparent these were the only issues the parties believed were before the court. Our appellate rules and procedures provide for full notice to parties of issues to be determined on an appeal of disciplinary action before our court and an opportunity to present argument on those issues, both by written brief and oral argument. DRA 6.1-6.5; RAP 10.1 *et seq.*, 11.1 *et seq.*

If this court wished to consider whether or not to disbar Mr. Stroh at its hearing, it should and could have said so by directing the responsible parties to address that matter in their briefs and at oral argument. We did not so order, and to consider now the issue of disbarment undermines the most fundamental notions of due process as to notice

and an opportunity to be heard.

Mr. Stroh was forced, without notice, to respond at oral argument before this court to isolated inquiry from two members of the court as to what discipline is appropriate. The majority cannot now assert such conduct is even roughly equivalent to constitutional requirements of notice, opportunity to prepare, brief and argue. Traditionally, we have provided such safeguards in the least important case before us. Federal and state constitutions guarantee due process of law when deprivation of the right to practice a profession is at issue. For this court to provide less is inexcusable when it was our order which defined the issues.

Although we may in extraordinary cases depart from our rules to exercise our inherent power in disciplinary cases, we still must meet constitutionally established minimum due process standards in disbarment cases. *In re Ruffalo*, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968). If we are supplanting the Disciplinary Board by our novel procedure in this case, we should not overlook that our rules provide an opportunity to argue before this court subsequent to Disciplinary Board action at which time notice and an opportunity to brief and argue the issues are all assured. Failure to provide these same guaranties in our consideration of Stroh's disbarment squarely conflicts with the import of our own rules and *Ruffalo*. The court there stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack* v. *Klein*, 385 U. S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 U. S. 257, 273. It was said in *Randall* v. *Brigham*, 7 Wall. 523, 540, that when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be

followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling* v. *Radford*, 243 U. S. 46, 51.

390 U.S. at 550.

State and federal courts that have considered the issue also have concluded attorney discipline proceedings must comport with due process. *In re Ming*, 469 F.2d 1352 (7th Cir. 1972); *In re Fleck*, 419 F.2d 1040 (6th Cir. 1969); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir.), *cert. denied*, 385 U.S. 960, 17 L. Ed. 2d 305, 87 S. Ct. 396 (1966); *Chaney v. State Bar of Cal.*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 20 L. Ed. 2d 162, 88 S. Ct. 1262 (1968); *In re Appeal of Icardi*, 436 Pa. 364, 260 A.2d 782 (1970); *In re Nelson*, 78 N.M. 739, 437 P.2d 1008 (1968). Such due process guaranties are consistent with the broader proposition that any state action encroaching upon one's ability to pursue one's own profession must meet due process standards. *Rodriguez de Quinonez v. Perez*, 596 F.2d 486 (1st Cir. 1979); *Maeda v. Amemiya*, 594 P.2d 136 (Hawaii 1979); *Wolfenbarger v. Hennessee*, 520 P.2d 809 (Okla. 1974); *Endler v. Schutzbank*, 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968). While flexibility is allowed courts in shaping disciplinary rules for attorneys, that flexibility is limited by due process. *In re Ming*, *supra* at 1355–56. There the court found violative of due process an executive committee's suspension of Ming without hearing before his criminal conviction became final. The court stated:

> Both licenses to practice law and welfare payments can be viewed as a type of "new property," Reich, The New Property, 73 Yale L.J. 733 (1964), the deprivation of which has drastic consequences to the individual. It is only fair and just that the Government not subject any person to such a drastic divestment without affording him substantial due process of law. . . .
>
> . . .
>
> . . . While in a hearing on a suspension based on a finalized conviction of a misdemeanor, an attorney may

> not be allowed to reargue the merits of the conviction, he would seem to have similar interests to those of the parolee, or a person being sentenced for a crime, to some hearing under due process. In such a situation, "a chance to respond" must be equated to "the opportunity to be heard" which necessarily implies a hearing. Appellant was not afforded such a hearing and we find that this denial was a deprivation of due process of law.

469 F.2d at 1355–56.

The majority recognizes that the order of the Chief Justice did not address the issue of what disciplinary action should be taken against Stroh but urges "justice to both him and the public demands that we resolve all issues involved in his case." Majority opinion, at 298. It is incongruous for the majority to assume under the guise of justice, all rudimentary concepts of due process are to be sacrificed in the exercise of this court's inherent supervisorial power in bar discipline cases. Rather than expediting resolution of this case, the majority's holding only ensures an appeal on federal due process grounds to the United States Supreme Court, which will further delay final resolution. Surely neither the public nor Mr. Stroh benefit from such a process. We should instead concentrate on making our own processes and rules more clear, which we are now doing. The same due process standards should apply in this case of great notoriety that would be applied in a case in which there is no public clamor.

Notwithstanding the majority's disregard for due process, there are other reasons why Mr. Stroh should not be disbarred at this time. Although I signed the majority opinion upholding the constitutionality of the statute Mr. Stroh was charged with violating, *State v. Stroh*, 91 Wn.2d 580, 588 P.2d 1182, 8 A.L.R.4th 760 (1979), the questions of the propriety of his criminal conviction have not been heard at the appellate level because Stroh dismissed his appeal in reliance on the Board's dismissal of his disciplinary case under our rules.

As discussed in the majority opinion, the Disciplinary Board, acting under the appropriate rules of court, dis-

missed Mr. Stroh's disciplinary action at its January 18, 1980, meeting. Pursuant to our rules, neither notice of dismissal of the complaint nor a copy of the Board's conclusions were forwarded to the Supreme Court. On November 14, 1980, Mr. Stroh voluntarily dismissed the appeal of his criminal conviction. In oral argument before this court, Mr. Stroh indicated he dismissed the appeal at the request of his partners who believed continuing publicity was damaging to them and with the reasonable expectation, based upon our rules, that no additional disciplinary proceedings would occur.[1] This case is unique in that Mr. Stroh abandoned the possibility of establishing his innocence with the reasonable expectation disciplinary proceedings against him were final.

Much delay, which is not attributable to Mr. Stroh, has already occurred regarding disposition of this case. In the past, we have declined to discipline an attorney even though his conduct would normally justify discipline where undue delay has existed, the attorney's actions since the misconduct were exemplary, and no further action was necessary to protect the public. *See In re McNerthney*, 95 Wn.2d 38, 621 P.2d 731 (1980); *In re Ressa*, 94 Wn.2d 882, 621 P.2d 153 (1980).

Over a year passed from the time the Board dismissed

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[1]Parenthetically, proposed rules now before this court for lawyer discipline will obviate most of the procedural problems that have arisen in this case. They provide any person filing a complaint alleging lawyer misconduct be advised of the disposition of the complaint. Proposed Rules for Lawyer Discipline 2.9(a)(7). A review committee would be established to serve as ombudsmen overseeing the formal actions of bar counsel, stipulations for suspension, disbarment and investigations of mental or physical inability to continue practice, and to determine, initially, in nonfelony cases, whether a crime is a serious crime. (A new term of art in the rules.) If the crime is found to be "serious" within the meaning of the new rules, state bar counsel would be required to petition the Supreme Court for an order suspending the lawyer during the pendency of disciplinary proceedings. The new rules also require notice to the Supreme Court of the Board's dismissal of disciplinary proceedings based upon a criminal conviction of the lawyer. Therefore, the unusual circumstances in this case will be unlikely to recur if the Supreme Court acts favorably on the proposed rules. Thus, the rule we establish for this case will in all likelihood apply only to the unusual facts of this case.

the complaint (February 22, 1980) until the time the prosecutor attempted to reopen the case (March 18, 1981). Stroh cannot be blamed for the Board's failure to notify the prosecution of its dismissal of the complaint or for the failure of the rules to require notice to this court of such dismissal.

He has satisfied the terms of his criminal sentence by serving 30 days in jail, paying a fine, and performing many hours of community service. He has, as well, been exposed to intense publicity surrounding his transgressions, and his personal and family life have become unsettled. Furthermore, since his charge and conviction, Mr. Stroh has abandoned the practice of criminal law for compelling personal reasons and has limited his practice to business clients. His conduct since his conviction has been spotless and he has retained the confidence of his business clients. The hearing panel found there was little chance of Stroh's recidivism, and his conduct since his crime has confirmed that belief.

In summary, the passage of time, the harm that has already befallen Stroh as the result of his acts, his abandonment of criminal practice and demonstrated rehabilitation, the general agreement that there is little chance of recidivism and, most importantly, Stroh's dismissal of his criminal appeal with the reasonable expectation that disciplinary action had concluded, should compel us to deny the reopening of disciplinary proceedings against him.

Under these circumstances, while the court could exercise its inherent jurisdiction to reopen this case, I believe it should not do so. The further hearings required by due process, which under all previous standards should be given for this court to reexplore the issue of whether or not Mr. Stroh should be disbarred, would only unnecessarily prolong this matter. I would not, however, simply end the matter. To assure the public that Mr. Stroh's conduct will be subject to the highest scrutiny, this court should order that any future allegations of misconduct against him be referred directly to us. With this condition, I would take no further action at this time.

DOLLIVER, J., concurs with UTTER, J.

In the Matter of the Disciplinary Proceeding Against HUGH W. STROH, an Attorney at Law.	
NORM MALENG, Prosecuting Attorney, *Petitioner,*	No. C.D. 6869
WASHINGTON STATE BAR ASSOCIATION, *Respondent.*	ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided by majority vote that respondent Stroh's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 9th day of July, 1982.

/S/ _____

Chief Justice

Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-821

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HUGH W. STROH, Petitioner,

v.

WASHINGTON STATE BAR ASSOCIATION,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NORM MALENG
King County Prosecuting Attorney

ROBERT S. LASNIK
Senior Deputy Prosecuting Attorney

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QUESTIONS PRESENTED FOR REVIEW

1. Should the United States Supreme Court review a decision by the highest court of a state disbarring an attorney who has been convicted of a felony and who received a full due process hearing from the Bar prior to disbarment?

2. Does the highest court of the State of Washington have the exclusive duty and power to interpret and enforce its rules governing the discipline of attorneys?

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OPINION BELOW

The opinion of the Supreme Court of Washington in In re Stroh is reported at 97 Wash. 2d 289, 644 P.2d 1161 (1982). The opinion is appended to Stroh's petition.

JURISDICTION

Petitioner Stroh invokes jurisdiction pursuant to 28 U.S.C. § 1254(1)(2). These provisions, however, apply to decisions by the federal courts of appeals. Stroh alleges that the action of the State Supreme Court in disbarring him following his conviction for a felony offense did not comport with the United States Constitution protections guaranteeing due process of law and equal protection. Presumably he meant to invoke jurisdiction under 28 U.S.C. § 1257. The Court should decline to assert jurisdiction in this case since

the procedures used by the State Supreme Court in the disbarment of Stroh complied with procedural due process requirements and did not violate equal protection.

CONSTITUTIONAL PROVISIONS

Petitioner alleges the State Supreme Court violated his rights under the Fourteenth Amendment to the United States Constitution to due process of law and to equal protection of the law.

STATEMENT OF THE CASE

1. Procedure

Hugh W. Stroh petitions this Court to review an order entered by the Washington State Supreme Court on May 19, 1982, resulting in Stroh's disbarment. Stroh was convicted on April 30, 1979, of the felony crime of Tampering With A Witness, a violation of Wash. Rev. Code

9A.72.120(1)(a). A superior court jury found that Stroh, in March, 1977, attempted to induce a witness to testify falsely in an official proceeding. On August 22, 1979, judgment and sentence was entered on this felony conviction. The King County Prosecutor (hereinafter Prosecutor) forwarded a certified copy of Stroh's conviction to the Clerk of the State Supreme Court for filing pursuant to Washington's Discipline Rules for Attorneys (DRA) 9.1(a), and to the Washington State Bar Association (hereinafter Bar) with a request that disciplinary action be initiated pursuant to DRA 1.1(a), since moral turpitude, dishonesty and corruption appeared to be inherent in the act.

By a Formal Complaint dated September 4, 1979, the Bar advised Stroh of the nature of the charges against him, the specific Discipline Rules for

Attorneys and Disciplinary Rules in the Code of Professional Responsibility which he was alleged to have violated, and the issues framed for the hearing (Appendix A). On October 30, 1979, a hearing was held before a Bar Hearing Officer. Stroh was entitled to counsel, but chose to appear pro se. He presented his case through affidavits, and through testimony of himself and another witness. The Bar offered into evidence certified copies of the amended information and the judgment and sentence adjudging Stroh guilty of the felony offense. On December 13, 1979, the Hearing Officer found that disbarment was the proper recommendation since Tampering With A Witness was a felony involving moral turpitude (Appendix B). Based solely on the record of this hearing, the Bar Disciplinary Board

(hereinafter Board) on February 22, 1980, found that Stroh's acts and conduct did not involve moral turpitude and directed that the complaint be dismissed.

Notice of Appeal in the criminal case was filed by Stroh in the Washington Court of Appeals on September 4, 1979, twelve days after judgment and sentence. Briefs were filed by both parties and oral argument was set for November 13, 1980. On November 12, 1980, Stroh requested that his appeal be withdrawn and dismissed. On November 14, 1980, the Court of Appeals granted that request. Stroh had received the Board's order dismissing the Bar complaint in February, 1980, had filed his Brief of Appellant in April, 1980, and withdrew his appeal the day before oral argument in November, 1980.

The Bar did not inform the complainant, the Prosecutor, or the State Supreme Court of its dismissal of the complaint. The Prosecutor did not discover this dismissal until January 13, 1981, when Stroh produced a copy of the dismissal in a hearing on his motion to suspend the balance of his jail sentence of 30 days confinement. The Prosecutor immediately sought reconsideration by the Board, which agreed to hear from the Prosecutor on March 20, 1981. On that date, King County Prosecutor Norm Maleng presented arguments on why the Board's action was not in compliance with the Court's rules for discipline. Stroh was then allowed to address the Board, without the Prosecutor present, on why it should not reconsider its order of dismissal. On April 3, 1981, the Board advised the Prosecutor that it would not reopen the matter. On April 27, 1981,

the Prosecutor filed with the State Supreme Court a Petition in support of its request that the State's highest court review the Bar proceedings relating to Stroh under its inherent authority over professional misconduct by members of the bar. An Order to Show Cause was issued on July 10, 1981, by the Chief Justice of the State Supreme Court setting the matter for a hearing on whether the court should order the transmittal of all files and records of the Bar for review to determine if the Board's actions complied with the high court's rules on attorney discipline (Appendix C).

Briefs were filed by the King County Prosecutor, the Washington State Bar Association and Stroh. The Prosecutor's opening brief concluded its petition to the court as follows:

> Petitioner respectfully requests that this Court reverse the dismissal of its complaint by the Disciplinary Board, hold as a matter of law that moral turpitude is an element of the crime of Tampering With A Witness . . . and remand the matter to the Disciplinary Board for a recommendation as to the disciplinary action which should result from Mr. Stroh's conviction, or, in the alternative, to examine the full record and exercise its inherent power to impose final disposition in this matter.

Petitioner's Brief, In re Stroh, at 30.

At oral argument on September 28, 1981, Stroh, represented by counsel, presented his arguments on why the Court should not intervene. In addition, Stroh himself was called upon by the Chief Justice to address the Court on the issue of what discipline should be imposed if the Court decided the Bar had erred. He did so address the Court. By letter on October 6, 1981, Stroh supplemented his oral remarks to the Court with written amplifications, including a transcript of the entire criminal trial.

The Prosecutor made no objection to this unusual form of supplementing the record. The Court specifically referred to Stroh's post-argument input, along with the record of the original fact-finding hearing, as the matters used by the Court to resolve the issue of discipline.

2. **Facts**

The underlying criminal conviction which formed the basis of the Court's disbarment of Stroh involved an incident where Stroh, as attorney for a man accused of driving while under the influence of intoxicants, attempted to get a police officer to testify falsely at an administrative hearing relating to his client's refusal to take a breathalyzer test as required by law. After hearing testimony from Stroh, the police

officer, and other witnesses, the jury returned a unanimous verdict of guilty.

REASONS FOR NOT GRANTING THE WRIT

1. **The United States Supreme Court Should Refuse To Review A Decision By The Highest Court Of A State Disbarring An Attorney Who Has Been Convicted Of A Felony And Who Received A Full Due Process Hearing From The Bar Prior To Disbarment.**

   a. The United States Supreme Court should not review decisions by the highest court of a state disbarring an attorney convicted of a felony absent extraordinary circumstances.

The United States Supreme Court has been justifiably reluctant to insert itself into disciplinary matters handled by state courts. As the Court said in Theard v. United States, 354 U.S. 278, 279 (1957).

> It is not for this Court, except within the narrow limits for review open to this Court . . . to sit in judgment on (state court) disbarments.

The Court has noted that it does not act as a reviewing court with authority to re-examine or reverse the action of the state supreme court in disbarring a member of the Bar of the courts of that state. Selling v. Radford, 243 U.S. 46, 50 (1916).

The Court only meets the issue of state court disbarment in one of two circumstances: Either the question of federal disbarment based on a state disbarment involving procedural defects is at issue (see, e.g., In re Ruffalo, 390 U.S. 544 (1967); Selling v. Radford, supra; and Theard v. United States, supra), or the underlying cause for discipline involves important constitutional issues of a broad sense, such as free speech (see, e.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Konigsberg, v. State Bar, 366 U.S. 36 (1960); and Schware v. Board of Bar

Examiners, 353 U.S. 232 (1952)), or freedom of religion (see, e.g., In re Summers, 325 U.S. 561 (1945)). Stroh's petition is of the former variety since the act he committed was in no way constitutionally protected behavior. Yet petitioner has not cited a single instance where the United States Supreme Court has accepted review of a state disbarment based on an alleged lack of notice. In re Ruffalo, supra, upon which petitioner almost exclusively relies, involved an Ohio attorney who was suspended by the Ohio Supreme Court for violations of ethical canons relating to an attorney purchasing an interest in the subject matter of litigation. Mahoning County Bar Ass'n. v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396 (1964). The federal district court found there was no misconduct and refused to discipline Ruffalo in its

court. In re Ruffalo, 249 F.Supp. 432 (N.D. Ohio 1965). The Court of Appeals agreed with one of the three charges against the attorney and disbarred him from practice in that court. In Re Ruffalo, 370 F.2d 447 (6th Cir. 1966). When asked to uphold the disbarment in the federal court, the Supreme Court decided it would not honor the Ohio court's order due to a lack of procedural due process at the original bar hearing. Yet the action of the Ohio court was not reviewed by the Court as it affected Ruffalo's status in that state. In re Ruffalo, 390 U.S. 545. The Court previously had denied a petition for a writ of certiorari of that state court order. Mahoning County Bar Ass'n. v. Ruffalo, cert. denied, 379 U.S. 931 (1964). Recently the Court also refused to review a disbarment order from the Kansas Supreme Court

where the petitioner alleged lack of notice and an opportunity to be heard. State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied, sub nom., Phelps v. Kansas, 444 U.S. 1045 (1980). The Kansas Supreme Court had added a charge not made or briefed prior to the court's opinion on the disciplinary case. A panel of the Tenth Circuit Court of Appeals found this violated due process, as applied to a subsequent attempt to disbar Phelps in federal court. In re Phelps, 637 F.2d 171 (10th Cir. 1981). Nothing remotely similar to the treatment of petitioners in State v. Phelps, supra, and In re Ruffalo, supra, occurred in Stroh's case below.

The United States Supreme Court consistently has refused to become involved with the discipline of lawyers in state court unless the underlying act

resulting in discipline fell in the category of constitutionally protected behavior. There is no such issue here since Stroh's acts were "offenses against the very object and purpose for which courts are established". State v. Stroh, 91 Wash. 2d 580, 582, 588 P.2d 1182 (1979).

b. Petitioner received full procedural due process prior to his disbarment by the State Supreme Court.

Petitioner Stroh received a full and fair criminal trial resulting in his conviction by a jury. He then received a full and fair hearing before a Bar Hearing Officer on the disciplinary complaint based on his criminal conviction. He had more than the minimum protections the constitution deems essential for a hearing of this nature

to comply with due process of law, including requirements that he

> be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

In re Oliver, 333 U.S. 257, 275 (1947).

Stroh was advised of the charges against him by the Bar (Appendix A) and had an opportunity to meet them through his own testimony and witnesses called in his behalf (Appendix B). Stroh never has claimed that the full hearing he received before the Bar Hearing officer on October 30, 1979, did not comply with due process. The Hearing Officer, acting as a trial court, heard all the evidence and testimony and concluded that disbarment was called for. The Board, acting as an appellate court reviewing solely the record below,

struck the Hearing Officer's conclusion and dismissed the complaint. The State Supreme Court found that the Board had erred, and, using that same record plus the oral and written comments of Stroh referred to above, determined that disbarment, as recommended by the Hearing Officer, was the proper sanction. In Re Stroh, 97 Wash. 2d 289, 298-99, 644 P.2d 116 (1982).

The issues framed by the Chief Justice's order prior to the September 28, 1981, hearing did not affirmatively note that the ultimate resolution of the matter might include imposition of discipline. (Appendix C) Yet this was simply a matter of not stating the obvious.

The Prosecutor's opening brief, prior to oral argument, raised the issue of discipline and concluded with an acknowledgment that the State Supreme

Court had the option of returning the case to the Board or, alternatively, to examine the full record and exercise its inherent power to impose final discipline. Petitioner's Brief at 30.

The Court's Order To Show Cause indicated that the burden was on the Bar and Stroh to show why, on the facts shown in the Prosecutor's Petition,

> . . . The Supreme Court should not order the transmittal of all the files and records of the Disciplinary Board in the above-entitled matter to the Supreme Court for review pursuant to the Discipline Rules for Attorneys and the inherent authority of the Supreme Court over professional conduct by a member of the Bar . . .

Appendix C.

This too should have put Stroh on notice. The Court is the final word on all matters of attorney discipline. When his case reached the high court, Stroh must have known he was before the one entity which had the power and duty

to impose final discipline. In State ex rel. Schwab v. State Bar Association, 80 Wash. 2d 266, 269, 493 P.2d 1237 (1972), the court said

> . . . this court does not share the power of discipline, disbarment, suspension, or reinstatement with either the legislature or the State Bar Association. The ultimate constitutional power clearly lies within the sole jurisdiction of the Supreme Court.

(Original emphasis.)

2. The State Supreme Court Has The Exclusive Duty And Power To Interpret And Enforce Its Rules Governing The Discipline Of Attorneys.

The Washington Supreme Court ruled that the Board erred when it dismissed the complaint involving an attorney convicted of a felony without notifying the complainant and the court. In re Stroh, 97 Wash. 2d at 297-98. The Court said the Board and the Bar acted in opposition to the general structure of the Discipline Rules for Attorneys and

specific measures which place ultimate authority for serious offenses with the state supreme court.

The Washington court consistently has held that only the supreme court has the power to promulgate rules of discipline, to interpret them and to enforce them. State ex rel. Schwab v. State Bar Association, supra; Dodd v. Bannister, 86 Wash. 2d 176, 187, 543 P.2d 237 (1975). The court ". . . does not share the power of discipline, disbarment, suspension or reinstatement with either the legislature or the bar association". Graham v. Bar Association, 86 Wash. 2d 624, 548 P.2d 310 (1976).

Stroh may not complain about unequal treatment based on the State's highest court interpreting its own rules in a matter of first impression. Nor can he claim disparate treatment from the court exercising its inherent power to review

cases where the Bar or the Board fails to carry out its duties regarding discipline. The Court has ccnsistently declared its intention to exercise such power where the Bar or the Board is derelict in their duties. Moore v. Smith, 89 Wash. 2d 932, 939, 578 P.2d 26 (1978). The Supreme Court had done so in 1975 in Dodd v. Bannister, supra, where the court reviewed a dismissal of a disciplinary complaint by the Bar based on the complainant's petition alleging the Bar had violated the court's rules. There was no express provision granting the Court the authority to review a dismissed complaint in that case either, yet the Court held

> If the power is inherent, as we hold it is, there is no necessity for the rules of the court to expressly affirm the existence of such power.

Dodd v. Bannister, supra at 188.

Stroh had no right to depend on the Board's order of dismissal since the court has reiterated that:

> We always give serious consideration to recommendations of the Board in disciplinary proceedings. Nevertheless, they are only advisory. The ultimate responsibility for determining the nature of discipline rests solely within this court.

In re Espodal, 82 Wash. 2d 834, 838, 514 P.2d 518 (1973).

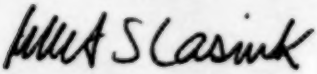
As a matter of fact, Stroh has been treated in a manner completely consistent with the class of attorneys convicted of felonies in Washington State. Every one before and after Stroh has been disbarred by the court regardless of a lesser recommendation by the Bar or the Board. See. e.g., In re Krogh, 85 Wash. 2d 462, 536 P.2d 518 (1975); In re Stroh, 97 Wash. 2d at 298; In re McGrath, 98 Wash. 2d 337, ___ P.2d ___ (1982). There has been no equal protection violation.

CONCLUSION

The King County Prosecutor respectfully requests that Stroh's Petition For A Writ of Certiorari be denied.

Respectfully submitted

NORM MALENG
King County
Prosecuting Attorney



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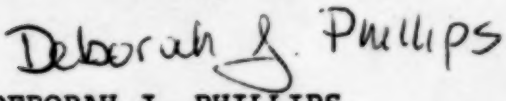

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Deputy Prosecuting
Attorney
Counsel of Record

Attorneys for Respondent

January 1983

APPENDIX A

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re:	)	
	)	
HUGH W. STROH,	)	FORMAL
	)	COMPLAINT
An Attorney	)	
at Law	)	
	)	

Pursuant to Rule 1.1(a) of the Discipline Rules for Attorneys of the Washington State Bar Association, a Formal Complaint is hereby filed against attorney Hugh W. Stroh, so that a hearing may be held before the hearing panel as provided in the Discipline Rules for Attorneys to determine: (1) Whether moral turpitude was in fact an element of the crime committed by Hugh W. Stroh, and (2) the disciplinary action recommended to result therefrom.

I. ADMISSION TO PRACTICE

1.1 Hugh W. Stroh, hereinafter respondent, was admitted to the practice of law by the Supreme Court of the State of Washington on September 28, 1970. At all times material hereto he has maintained his professional office in King County, Washington.

II. FORMAL COMPLAINT

2.1 On April 30, 1979, respondent was found guilty of the crime of tampering with a witness, a class "C" felony,

in violation of RCW 9A.72.120(1)(a).

2.2 RCW 9A.72.120 provides as follows:

> (1) A person is guilty of tampering with a witness if he attempts to induce a witness or person he has reason to believe is about to be called as a witness in any official proceeding to:
>
> > (a) Testify falsely or, without right or privilege to do so, to withhold any testimony.

2.3 On August 22, 1979, respondent was given a deferred sentence. A true copy of the deferred sentence order is attached to this complaint as Exhibit A.

2.4 The acts and omissions of respondent, above described, constitute a violation of the following provisions of the Discipline Rules for Attorneys; copies of which are attached and incorporated by references as fully set out: DRA 1.1(a) [prohibiting an act involving moral turpitude, dishonesty or corruption]; (i) [prohibiting a violation of the Code of Professional Responsibility]; (k) [prohibiting conduct demonstrating an unfitness to practice law].

A violation of DRA 1.1(i) is more specifically demonstrated by respondent's transgression of the following provisions of the Code of Professional Responsibility, copies of which are attached and incorporated by reference as if fully set out: DR 1-102(A) (3) [prohibiting illegal conduct involving

moral turpitude]; (5) [prohibiting conduct prejudicial to the administration of justice]; (6) [prohibiting conduct demonstrating an unfitness to practice law].

III. ISSUES FOR HEARING

Pursuant to DRA 1.1(a), the Washington State Bar Association requests a hearing be held to determine the following:

(1) Whether moral turpitude was in fact an element of the crime committed by respondent.

(2) The disciplinary action recommended.

DATED this 4th day of September, 1979.

WASHINGTON STATE BAR ASSOCIATION

By: /s/
LELAND G. RIPLEY
State Bar Counsel

RULE 1.1

Grounds

An attorney at law may be subjected to the disciplinary sanctions or actions set forth in Rule 1.2 for any of the following causes, hereinafter sometimes referred to as violations of the rules of professional conduct:

(a) The commission of any act involving moral turpitude, dishonesty, or corruption, whether the same be committed in the course of his or her conduct as an attorney, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action. Upon such conviction, however, the judgment and sentence shall be conclusive evidence at the ensuing disciplinary hearing of the guilt of the respondent attorney of the crime described in the indictment or information, and of his or her violation of the statute upon which it is based. A disciplinary hearing as provided in Rule 3.2 of these rules shall be had to determine, (1) whether moral turpitude was in fact an element of the crime committed by the respondent attorney and, (2) the disciplinary action recommended to result therefrom.

. . . .

(i) Violation of the Code of Professional Responsibility of the profession adopted by the Supreme Court of the State of Washington.

. . . .

(k) Conduct demonstrating unfitness to practice law.

DR 1-1-2 Misconduct

(A) A lawyer shall not:

. . . .

(3) Engage in illegal conduct involving moral turpitude.

. . . .

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

APPENDIX B

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re	)	
	)	
HUGH W. STROH	)	FINDINGS,
	)	CONCLUSIONS
An Attorney	)	AND
Law	)	RECOMMENDATIONS
	)	

THIS MATTER having come before the undersigned Hearing Panel Officer, for hearing on october 30, 1979, and the Bar Association appearing through Leland G. Ripley, and Hugh W. Stroh appearing pro se and the undersigned having heard the evidence, testimony, and argument of counsel, and being fully advised makes the following:

FINDINGS OF FACT

I.

Hugh W. Stroh, hereinafter respondent, was admitted to the practice of law by the Supreme Court of the State of Washington on September 28, 1970. At all times material hereto he has maintained his professional office in King County Washington.

II.

On April 30, 1979, respondent was found guilty of the crime of tampering with a witness, a Class C felony, in violation of RCW 9A.72.120(1)(a) in that he attempted to induce a person he had reason to believe would be called as a witness to testify falsely.

III.

On August 22, 1979, respondent was given a deferred sentence.

IV.

The Affidavit of Prior Disciplinary Record is hereby incorporated by this reference herein as if fully set out and made a findings of this examiner.

V.

Respondent Attorney, Hugh W. Stroh, has continuously practiced law since the date of incident of March 3, 1977, to present without incident and it has been stipulated that Respondent Attorney's character and ability as a professional since the date of incident is good.

FROM THE FOREGOING FINDINGS OF FACT, the Hearing Panel Officer makes the following:

CONCLUSIONS

I.

Respondent's conduct in attempting to get a witness to testify falsely violated the commonly accepted standard of good morals, honesty and justice, and involved moral turpitude.

II.

Respondent's conduct violates Rule 1.1(a) and (i) of the Discipline Rules for Attorneys which provide:

> An attorney at law may be subjected to the disciplinary sanctions or actions set forth in Rule 1.2 for any of the following causes, hereinafter sometimes referred to as

violations of the rules of professional conduct:

(a) The commission of any act involving moral turpitude, dishonesty, or corruption, whether the same be committed in the course of his or her conduct as an attorney or otherwise, and whether the same constitutes a felony or misdemeanor or not; . . .

(i) Violation of the Code of Professional Responsibility of the profession adopted by the Supreme Court of the State of Washington.

Respondent's violation of Rule 1.1(i) is based upon his transgression of the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct

(A) A lawyer shall not:
. . .

(3) Engage in illegal conduct involving moral turpitude.

(5) Engage in conduct that is prejudicial to the administration of justice.

III.

This is a case of first impression involving an attorney convicted under RCW 9A which mandates a segregation of felonies into various degrees; that is, Class A; Class B; Class C. Because of the respondent's conviction of a Class C

felony combined with legal precedent addressing disposition of the same, as promulgated by the Supreme Court of the State of Washington, the following recommendation is necessary and becomes a recommendation of this Hearing Panel Officer; that is:

RECOMMENDATION

Respondent has been convicted of a felony involving moral turpitude. It is the Hearing Panel Officer's opinion that the possibility of recidivism of this occurrance involving the respondent attorney is remote; however, and because respondent has been convicted of a felony involving moral turpitude, it is the Hearing Panel Officer's recommendation that, subject to Rule 8.1(a) of the Discipline Rules for Attorneys, respondent be disbarred.

DATED this 13th of December, 1979.

WASHINGTON STATE BAR ASSOCIATION

By /s/
Richard J. Waters
Hearing Panel Officer

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

In The Matter Of	)	
	)	C.D 6869
HUGH W. STROH,	)	
	)	ORDER TO
Attorney at	)	SHOW CAUSE
Law	)	
	)	

The above entitled matter came on for hearing before the Chief Justice of the Supreme Court, upon the Petition of the King County Prosecuting Attorney. Hugh W. Stroh was present, acting pro se. Petitioner was represented by King County Prosecutor Norm Maleng and Deputy Robert Lasnik; the Washington State Bar Association and its Disciplinary Board were represented by Kurt Bulmer, General Counsel.

After consideration of said Petition, the memorandum in support thereof, the response of the Bar Association and oral argument

IT IS HEREBY ORDERED:

1(a). That Hugh W. Stroh, the Washington State Bar Association and the Disciplinary Board thereof shall show cause on the 9th day of September, 1981, at the hour of 1:30 p.m. why on the facts shown in said Petition, the Supreme Court should not order the transmittal of all the files and records

of the Disciplinary Board in the above entitled matter to the Supreme Court for review pursuant to the Discipline Rules for Attorneys and the inherent authority of the Supreme Court over professional conduct by a member of the Bar and

(b) Why the Supreme Court should not review the proceedings before the Disciplinary Board in this matter and the Order of said Board of February 22, 1980, to determine procedural and substantive compliance with the Discipline Rules for Attorneys.

2. That the parties shall file briefs and present oral argument according to a schedule set by the Clerk of the Supreme Court concerning the following issues, and other issues deemed relevant by the parties:

(a) Should the Court take cognizance of this matter either upon the Petition of the Prosecuting Attorney of King County or upon its own motion?

(b) Did the proceedings before the Disciplinary Board and its Order of February 22, 1980, comply with the Discipline Rules for Attorneys (1) as a matter of law and/or (2) as a matter of fact?

3. That a copy of said Petition and of this Order to Show Cause be served on Hugh W. Stroh, the Washington State Bar Association and the Disciplinary Board thereof, by serving Hugh W. Stroh personally and the Washington State Bar Association and its Disciplinary Board by leaving two copies of the Petition

and this Order at the office of the Washington State Bar Association, 505 Madison Street, Seattle, Washington.

DATED this 10th day of July, 1981.

/s/ Robert F. Brachtenbach
Chief Justice